

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KYLE AVERY,  
CDCR #E-67897,

Plaintiff,

vs.

A. ALLAMBY, Lieutenant;  
V. CANADA, Lieutenant;  
J. N. CLARKE, Lieutenant,

Defendants.

Civil No. 13cv3169 BTM (DHB)

**ORDER:**

- 1) GRANTING PLAINTIFF'S MOTION FOR U.S. MARSHAL SERVICE UPON DEFENDANT CLARKE (Doc. No. 15)**
- (2) DIRECTING DEPUTY ATTORNEY GENERAL TO PROVIDE DEFENDANT CLARKE'S FORWARDING ADDRESS IN CONFIDENTIAL MEMO TO U.S. MARSHAL IN ORDER TO EFFECT SERVICE PURSUANT TO 28 U.S.C. § 1915(d) AND FED.R.CIV.P. 4(c)(3)**

**AND**

- (3) GRANTING PLAINTIFF EXTENSION OF TIME TO EFFECT SERVICE UPON DEFENDANT CLARKE PURSUANT TO FED.R.CIV.P. 4(m)**

Kyle Avery ("Plaintiff"), is currently incarcerated at Richard J. Donovan Correctional Facility ("RJD"), and proceeding in pro se and *in forma pauperis* in this civil action filed pursuant to 42 U.S.C. § 1983.

1     **I. Procedural Background**

2       On November 10, 2014, the Honorable John A. Houston screened Plaintiff's First  
 3 Amended Complaint ("FAC") (Doc. No. 5), and dismissed Defendants Ruffino, Benyard,  
 4 and Paramo as parties pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b)(1).<sup>1</sup> *See* Nov.  
 5 10, 2014 Order (Doc. No. 6). At the same time, however, Judge Houston directed the  
 6 U.S. Marshal to effect service of a summons and Plaintiff's FAC upon Defendants  
 7 Allamby, Canada, and Clarke pursuant to 28 U.S.C. § 1915(d) and FED.R.CIV.P. 4(c)(3).  
 8 *Id.*

9       On November 12, 2014, the Clerk issued the summons on Plaintiff's FAC, and  
 10 forwarded an "IFP package" to him, which included certified copies of his FAC, a U.S.  
 11 Marshal Form 285 ("USM Form 285") for Defendants Allamby, Canada, and Clarke, and  
 12 a copy of the Court's July 11, 2014 Order (Doc. No. 4) granting him leave to proceed  
 13 IFP. *See* Doc. No. 7; *Puett v. Blandford*, 895 F.2d 630, 634 (9th Cir. 1990) ("An  
 14 incarcerated pro se plaintiff proceeding *in forma pauperis* is entitled to rely on the U.S.  
 15 Marshal for service of summons and complaint").

16       On December 30, 2014, the U.S. Marshal returned Plaintiff's USM Form 285  
 17 unexecuted as to Defendant J. N. Clarke, with a notation indicating that per the  
 18 Litigation Coordinator at RJD, where Plaintiff indicated on his USM Form 285 that Lt.  
 19 Clarke could be served: "Defendant is retired. No forwarding address provided." *See*  
 20 Doc. No. 8. Waivers of personal service upon the remaining two Defendants (Canada  
 21 and Allamby) were subsequently filed on January 20, 2015 (Doc. Nos. 9, 10), and those  
 22 Defendants have filed an Answer (Doc. No. 11).

23     **II. Plaintiff's Motion**

24       On January 28, 2015, Plaintiff filed a Motion for Service upon Defendant Clarke  
 25 (Doc. No. 15). Plaintiff requests that this Court issue an Order directing the Deputy  
 26 Attorney General representing Defendants Canada and Allamby to ascertain Defendant

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27       <sup>1</sup> On February 6, 2015, the case was transferred to this Court's docket as related  
 28 to *Avery v. Paramo, et al.*, S.D. Cal. Civil Case No. 13cv2261 BTM (DHB), pursuant to  
 the "Low Number Rule," S.D. CAL. CIVLR 40.1 (Doc. No. 13).

1 Clarke's forwarding address and to provide it to the U.S. Marshal in a confidential  
 2 manner so that he can be served. *See* Pl.'s Mot. (Doc. No. 15) at 1-3.

3 **III. FED.R.CIV.P. 4 Service Rules**

4 Rule 4 of the Federal Rules of Civil Procedure provides that:

5 [i]f a defendant is not served within 120 days after the  
 6 complaint is filed, the court—on motion or on its own after  
 7 notice to the plaintiff—must dismiss the action without  
 8 prejudice against the defendant or order that service be made  
 within a specified time. But if the plaintiff shows good cause  
 for the failure, the court must extend the time for service for  
 an appropriate period.

9 FED.R.CIV.P. 4(m).

10 In cases involving a plaintiff proceeding IFP, a United States Marshal, upon order  
 11 of the court, serves the summons and the complaint. FED.R.CIV.P. 4(c)(3) (providing for  
 12 service by a United States marshal or deputy marshal “if the plaintiff is authorized to  
 13 proceed in forma pauperis under 28 U.S.C § 1915.”); 28 U.S.C. § 1915(d) (“The officers  
 14 of the court shall issue and serve all process, and perform all duties in [IFP] cases.”).  
 15 “[A]n incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the  
 16 U.S. Marshal for service of the summons and complaint and . . . should not be penalized  
 17 by having his action dismissed for failure to effect service where the U.S. Marshal or the  
 18 court clerk has failed to perform his duties.”” *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th  
 19 Cir. 1994) (quoting *Puett*, 912 F.2d at 275), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995). “So long as the prisoner has furnished the information  
 21 necessary to identify the defendant, the marshal’s failure to effect service is  
 22 ‘automatically good cause.’” *Walker*, 14 F.3d at 1422 (quoting *Sellers v. United States*,  
 23 902 F.2d 598, 603 (7th Cir. 1990)). However, where a pro se plaintiff fails to provide  
 24 the Marshal with accurate and sufficient information to effect service of the summons  
 25 and complaint, the court’s sua sponte dismissal of the unserved defendants is  
 26 appropriate. *Walker*, 14 F.3d at 1421-22; *see also Rochon v. Dawson*, 828 F.2d 1107,  
 27 1110 (5th Cir. 1987) (noting that plaintiff “may not remain silent and do nothing to  
 28 effectuate such service”; rather, “[a]t a minimum, a plaintiff should request service upon

1 the appropriate defendant and attempt to remedy any apparent defects of which [he] has  
 2 knowledge.”).

3 The Court enjoys broad discretion under Rule 4(m) to extend time for service even  
 4 without a showing of good cause. *In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001);  
 5 *Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003) (holding that district  
 6 court may, under the broad discretion granted by FED.R.CIV.P. 4(m), extend time for  
 7 service retroactively after the 120-day service period has expired).

8 Here, the Court finds Plaintiff has provided information “necessary to sufficiently  
 9 identify” J. N. Clarke, whom he identifies as a Correctional Lieutenant employed at RJD  
 10 at the time his cause of action accrued against him in August 2013. *Walker*, 14 F.3d at  
 11 1422. *See also* Pl.’s FAC (Doc. No. 5 at 5; Doc. No. 8). The only reason the U.S.  
 12 Marshal was unable to effect service upon Clarke at RJD however, is due to Clarke’s  
 13 retirement, and the presumably confidential nature of his forwarding address. Thus, *as*  
 14 *long as the privacy of Defendant Clarke’s forwarding address can be preserved*, Plaintiff  
 15 is entitled to rely on the U.S. Marshal to effect service upon Clarke on his behalf. *See*  
 16 *Puett*, 912 F.2d at 275. The Court will direct the Deputy Attorney General assigned to  
 17 this case to contact the Litigation Coordinator at RJD, and to ask him or her to provide  
 18 any forwarding address in his or her possession, or which is obtainable from the CDCR’s  
 19 personnel records for Defendant Lt. J. N. Clarke, now retired, and to forward that address  
 20 to the U.S. Marshal in a *confidential memorandum* indicating that the summons and  
 21 Plaintiff’s FAC is to be served upon Clarke at that address.<sup>2</sup>

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25       <sup>2</sup> Pursuant to this confidential service Order, Defendant Clarke’s address *shall not*  
 26 appear on any U.S. Marshal Form 285, *shall not* be made accessible to Plaintiff under  
 27 any circumstances, and *shall not* be made part of the Court’s record. While a “state  
 28 prison official may be justifiably reluctant to provide employee addresses to a prisoner  
 . . . due to security concerns, it can hardly claim the same reluctance in providing the  
 information to a federal law enforcement agency.” *Graham v. Satkoski*, 51 F.3d 710, 713  
 (7th Cir. 1995).

1      **IV. Conclusion and Order**

2      Accordingly, the Court hereby:

3      1)    **GRANTS** Plaintiff's Motion for U.S. Marshal Service upon Defendant  
4      Clarke (Doc. No. 15).

5      2)    **ORDERS** the Deputy Attorney General assigned to this case to determine  
6      from the Litigation Coordinator at RJD if a forwarding address exists in his or her  
7      records, or is easily obtainable from the CDCR's personnel records, for Defendant Lt.  
8      J. N. Clarke, now retired, and to provide it to the U.S. Marshal in a *confidential*  
9      *memorandum* indicating that the summons and Plaintiff's FAC (Doc. Nos. 5, 7) are to  
10     be served upon Lt. Clarke at that address.

11     3)    **ORDERS** the U.S. Marshal, pursuant to FED.R.CIV.P. 4(c)(3), (m) and 28  
12     U.S.C. § 1915(d), to *within 30 days of receiving* Defendant Clarke's confidential  
13     forwarding address, effect service of Plaintiff's FAC (Doc. No. 5) and summons (Doc.  
14     No. 7) upon Defendant Clarke. All costs of service will be advanced by the United  
15     States pursuant to the Court's July 11, 2014 and November 10, 2014 Orders granting  
16     Plaintiff leave to proceed IFP and directing service pursuant to 28 U.S.C. § 1915(d) and  
17     FED.R.CIV.P. 4(c)(3) (Doc. Nos. 4, 6).

18     **IT IS SO ORDERED.**

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20     DATED: February 17, 2015

21       
22     BARRY TED MOSKOWITZ, Chief Judge  
23     United States District Court  
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